Heng Chen Ming v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–126 OF 2009
ABDUL WAHAB PATAIL, MOHAMAD ARIFF JJCA AND DAVID WONG J
5 JUNE 2013

Evidence — Expert evidence — Chemist's analysis of substance — Whether analysis properly done — Whether s 37(j) of the Dangerous Drugs Act 1952 applied to analysis — Whether discrepancy existed between weight of drugs recovered by police and weight determined by chemist — Whether chain of evidence relating to drug exhibits broken

The appellant was convicted and sentenced by the High Court on a charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') of trafficking in 150.50g of a dangerous drug. In his instant appeal against conviction and sentence the appellant said there were serious flaws in the prosecution evidence which entitled him to an acquittal. Inter alia, he said (i) the chemist at the trial failed to state from which of the four plastic packets of the drugs he took 21 samples for testing as not all of the substance was used for his analysis. As such, s 37(j) of the DDA had not been complied with (ii) the discrepancy between the chemist's finding of a nett weight of 193.9805g of the drugs and the investigating officer's finding of a weight of 194.9g was not explained (iii) contradictory statements between the police witnesses and also as between them and the police report as to where the drugs were recovered from and which one of the police officers marked one of the plastic packets containing the drugs broke the chain of evidence as to the identity of the drugs.

Held, dismissing the appeal:

(1) The chemist found the nett weight of the white crystalline substance in the four plastic packets to be 193.98g. The substance was then compounded into a homogenous powder before 21 samples were taken for analysis. That the chemist did not use up all the drugs in question was irrelevant. Homogenisation ensured the samples taken were a uniform mix of the substance from all the four packets. Analysis of the homogenised samples provided the content of drug in the sample based upon which, as well as the nett weight, the weight of the drug was calculated. Given that the analysis was performed on the samples from the homogenised contents of the four packets, the operation of s 37(j) of the DDA did not arise (see paras 7–9).

(2) There was no discrepancy in the weight of the drugs and no question

whether the correct substance was handed over by the police to the chemist. The weight given by the investigating officer was a gross weight whilst that given by the chemist was the nett weight of the white crystalline substance minus the weight of the plastic packets (see para 9).

(3) Whether it was PW3 or PW4 who marked plastic packet E1, and whether PW4 or the police report was correct that of the other three packets, two were found in the left sock and one in the right sock or vice versa, did not directly affect the identity of the four packets of the drugs in this case. They pertained only to the question which witness or whether the police report was correct; they did not affect the issue of the identity of the four packets. The discrepancies were minor and did not raise any reasonable doubt (see para 16).

(4) The trial judge had considered the testimony of the accused together with all of the evidence before concluding that he was left in no reasonable doubt that the accused was guilty of the offence he was charged with (see para 19).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum oleh Mahkamah Tinggi atas tuduhan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar dadah berbahaya sebanyak 150.50g. Dalam rayuan ini terhadap sabitan dan hukuman perayu menyatakan terdapat kesilapan serius dalam keterangan pendakwaan yang memberikan dia hak kepada pembebasan. Antara lain, dia menyatakan (i) ahli kimia semasa perbicaraan gagal untuk menyatakan daripada manakah empat paket plastik dadah yang 21 sampel diambilnya untuk ujian kerana bukan kesemua bahan digunakan untuk analisisnya. Oleh itu, s 37(j) ADB tidak dipatuhi (ii) percanggahan antara dapatan ahli kimia mengenai berat bersih dadah dan dapatan pegawai penyiasat terhadap berat 194.9g tidak dijelaskan (iii) pernyataan bercanggah antara saksi polis dan juga antara mereka dan laporan polis terhadap di mana dadah dijumpai dan pegawai polis yang manakah yang menandakan salah satu paket plastik yang mengandungi dadah mematahkan rantaian keterangan terhadap identiti dadah.

Diputuskan, menolak rayuan:

(1) Ahli kimia mendapati berat bersih bahan kristal putih dalam empat paket plastik adalah 193.98g. Bahan tersebut kemudiannya dikompaun menjadi serbuk sebelum 21 sampel homogen diambil untuk dianalisis. Bahawa ahli kimia tidak menggunakan kesemua dadah yang dipersoalkan adalah tidak relevan. Homogenisasi memastikan sampel yang diambil adalah campuran bahan yang seragam daripada kesemua empat paket. Analisis sampel homogen memperuntukkan kandungan dadah dalam sampel yang didasarkan, begitu juga berat bersih, berat

dadah yang dikira. Memandangkan analisis telah dilakukan ke atas sampel daripada kandungan homogen keempat paket tersebut, pemakaian s 37(j) ADB tidak berbangkit (lihat perenggan 7–9).

(2) Tiada percanggahan dalam berat dadah dan tiada persoalan sama ada bahan betul diberikan kepada polis kepada ahli kimia. Berat yang diberikan oleh pegawai penyiasat adalah berat kasar sementara apa yang diberikan oleh ahli kimia adalah berat bersih bahan kristal putih tolak berat paket plastik (lihat perenggan 9).

(3) Sama ada ia adalah PW3 atau PW4 siapa yang menandakan paket plastik E1, dan sama ada PW4 atau laporan polis adalah betul iaitu tiga paket yang lain, dua dijumpai di dalam sarung kaki kiri dan satu dalam sarung kaki kanan atau vice versa, tidak secara terus menjejaskan indentiti empat paket dadah dalam kes ini. Ia berhubung hanya kepada persoalan saksi manakah atau sama ada laporan polis adalah betul; ia tidak menjejaskan isu identiti empat paket tersebut. Percanggahan adalah sedikit dan tidak membangkitkan apa-apa keraguan munasabah (lihat perenggan 16).

(4) Hakim perbicaraan telah mempertimbangkan testimoni tertuduh bersama dengan kesemua keterangan sebelum memutuskan bahawa beliau tanpa keraguan munasabah bersalah terhadap kesalahan yang didakwa terhadapnya (lihat perenggan 19).]

Notes

For cases on chemist's analysis of substance, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1745–1748.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489, CA (folld)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
PP v Ibrahim Mahmud [2001] MLJU 197; [2001] 3 CLJ 284, HC (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(j)

Appeal from: Criminal Appeal No K45–01 of 2007 (High Court, Kota Kinabalu)

Rakhbir Singh (Rakhbir Singh & Co) for the appellant.
Sannihah bt Rhazali (Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The appellant Heng Chen Ming was charged, tried, convicted and sentenced upon the following charge:

That you on 4/1/2006 at around 12.20 pm, at checkpoint, departure hall, Terminal 1, Kota Kinabalu International Airport, in the District of Kota Kinabalu, in the State of Sabah, did on your behalf traffic in a dangerous drug to wit 150.50 grammes that you have thereby committed 39B(1)(a) of the Dangerous Drugs Act, 1952 (Act 234) and punishable under Section 39B(2) of the same Act.

THE GROUNDS OF APPEAL

[2] The grounds on which the appellant seeks to rely on were categorised by his counsel as follows:

(a) The chemistry evidence; and

(b) The chain of evidence.

THE CHEMISTRY EVIDENCE

[3] In respect of the chemistry evidence, firstly, it was submitted that:

(a) the chemist did not analyse all the drugs in question as there is a remaining amount;

(b) evidence from which of the plastic packages he took the 21 samples for testing;

(c) if the chemist took from say plastic package A, and it tested positive for the drug, the court can only assume there are drugs in plastic B, C and D;

(d) the conviction is therefore unsafe and in the circumstances it must be quashed.

[4] Secondly, it was submitted:

(a) the chemist did not produce a calibration certificate;

(b) the chemist said the net weight of the total substance is 193.9805g;

(c) the investigating officer handed over substance weighing 194.9g;

(d) this serious discrepancy has not been explained;

(e) it is a serious flaw in the prosecution case;

(f) it raises the question was the correct substance handed over;

(g) it is a gap in the narrative of the prosecution case and is fatal.

[5] Thirdly, it was submitted:

(a) s 37(j) of the Dangerous Drugs Act 1952 'DDA' provides:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, that the contents of all the receptacles consist of or contain the same proportion of such drug;

(b) the chemist admitted that he did not rely on s 37(j) of the DDA;

(c) this is fatal.

[6] We examined the grounds of judgment and the notes of proceedings.

[7] The chemist Ahmad Nazri bin Husain ('PW2') had explained that in respect of the four plastic packets marked A1 to A4, each containing white crystalline substances:

> … First of all I weighed all the 4 plastic packets tagline with the contents one by one and the nett weight on the white crystalline substance was 193.98 grams. Then I compounded the white crystalline substance using a blender until they become homogenous powder. I carried my tests on the homogenous powder …

[8] The nett weight of 193.98g of white crystalline substance means it was the nett weight of the contents of the four packets. This was explained at p 11 of the notes of proceedings. This was homogenised before 21 representative samples were taken for analysis. That the chemist did not use up all the drugs in question is, to put it mildly, irrelevant. Homogenisation ensures the samples taken are a uniform mix of the white crystalline substances from all the four packets. As explained by the witness, analysis of the homogenised samples provided the content of drug in the sample based upon which and the nett weight, the weight of the drug is calculated. The answer that the tests he carried out were based on the procedure issued by the Chemistry Department of Malaysia, which was drafted based on the recommended method by the United Nation, was not challenged. The flaw postulated in the first submission, therefore, does not arise and the submission holds no merit in the circumstances.

[9] That the investigating officer said the weight was 194.9g and the chemist found the nett weight to be 193.9805g is not a discrepancy as the investigating

officer arrived at the weight by weighing the four packets containing the white crystalline substances is a gross weight, while the weight given by the chemist is the nett weight, ie the weight of the white crystalline substances found inside and without the weight of the plastic packets. Subtracting the nett weight from the gross weight, one would obtain the weight of the plastic packets. There is, therefore, no foundation established for the submission that it raises the question of whether the correct substance was handed over.

[10] The witness was cross-examined. His explanation on homogenisation was not challenged. He testified that when he weighed the white crystalline substance on 23 February 2006, there was a valid calibration certificate. The chemist was not sure of the weight of the white substance in the packet P1(B). That, however, is irrelevant as it was the balance of the white powder after the 21 samples were taken for analysis.

[11] We, therefore, found no merit in the second submission.

[12] Given that the analysis by the chemist was performed on the samples from the homogenised contents of the four plastic packets, the operation of s 37(j) of the DDA does not arise.

[13] These issues were addressed in the grounds of judgment of the learned judicial commissioner. There being no error of fact or appreciation of facts by the trial judge on the issue of the chemistry evidence, we dismissed the first ground of appeal.

THE CHAIN OF EVIDENCE

[14] In respect of the chain of evidence, it was submitted there was fatal mix up:

(a) PW3 Sergeant Yunus found plastic 1. He said that he marked the plastic E1 and signed it as well;

(b) in re-examination, he admitted that he does not have the power to mark the packet 1;

(c) PW4 Sargeant Dzulkifli said he found one packet in the right sock and one packet in the left sock;

(d) he then found one more packet in the left side;

(e) this is in conflict with the police report where it says that there are two packets in the right and one in the left side;

(f) PW4 said he took the first packet from PW5 Lance Corporal Meranah and marked it E1 while PW3 said that he marked E1 on the plastic before he handed over to PW5;

(g) PW5 supports the contention that the packet that was retrieved by PW3 Yunus was already marked as E1;

(h) PW4 said that he received an unmarked packet;

(i) PW5 was in complete doubt whether she had handed over the right packet to PW4 — she was unsure if there were other things in the drawer or other exhibits therein;

(j) the markings of the packet were not done in the presence of the appellant — this is very serious and it is a fatal flaw in the prosecution case.

(k) Doubt must be resolved in favour of the appellant.

[15] In considering this part of the submissions, we find assistance in the explanation and reasoning of Abdul Hamid Mohamad JCA (as he then was) in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 (CA).

> The proof of the chain of evidence is only a method of proving that fact. The fact that there is 'a gap' does not necessarily mean that that fact is not proved. It depends on the facts and circumstances of each case. There may be a gap in the chain of evidence. But if, for example, during that 'gap' the exhibits are sealed, numbered with identification numbers, there is no evidence of tampering, there is nothing that would give rise to a doubt that that exhibit is the exhibit that was recovered in that case and that was analysed by the chemist, the fact that there is a gap, in the circumstances of the case may not give rise to any doubt of the fact.

[16] Examination of the grounds of judgment and the notes of proceedings satisfied us that whether it was PW3 or PW4 who marked the plastic packet E1, and whether PW4 or the police report was correct that of the other three packets found in the socks, two were found in the left sock and one in the right sock or vice versa, do not directly affect the identity of the four packets of white crystalline substances in this case. They pertain only to the question which witness or whether the police report was perfectly correct. But they do not affect the issue of the identity of the four packets. The discrepancies were, therefore, minor and did not raise any reasonable doubt.

[17] We, therefore, dismissed this second ground of appeal.

[18] Reviewing the grounds of judgment, we find that the learned judicial commissioner had properly first considered whether a prima facie case had been established before calling upon the accused to enter upon his defence. In his consideration of the defence, the learned judicial commissioner properly

took guidance from *Public Prosecutor v Ibrahim Mahmud* [2001] MLJU 197; [2001] 3 CLJ 284 and *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85. He considered the testimony of the accused and addressed his mind to the question whether the accused had raised a reasonable doubt. He did so by adopting the explanation of what constitutes proof beyond reasonable doubt by Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372:

> ... It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[19] In short, the learned judicial commissioner considered the testimony of the accused together with all of the evidence before the court, before making his conclusion that he was left in no reasonable doubt that the accused is guilty of the offence as charged.

[20] We, therefore, dismissed the appeal and affirm the conviction and sentence of the High Court.

Appeal dismissed.

Reported by Ashok Kumar